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SUBJECT: GOK BILL OUTLINES ROADMAP TO NEW CONSTITUTION

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SUMMARY

[1](#)1. The Ministry of Justice recently published the Constitution of Kenya Review Bill of 2008, outlining the process for writing and adopting a new constitution. The new constitution could take as long as 24 months to enter into force, not the 12 months agreed at the Kofi Annan-led mediation efforts in February.. The Bill calls for the formation of a mixed international-Kenyan Committee of Experts, which will isolate areas of contention in earlier draft constitutions -- most significantly, (1) the issue of Presidential versus Parliamentary system of government; and (2) the degree of decentralization of government powers. The Committee will submit proposals to resolve these issues to an ad-hoc Parliamentary Select Committee (PSC). The PSC will decide which of the Committee's recommendations to accept. On the basis of the PSC's recommendations, the Committee of Experts will prepare a new draft constitution that the entire Parliament will vote on. If Parliament approves the new draft by a 65 per cent margin, it will be put to a referendum, administered by the Electoral Commission of Kenya (ECK). Civil society groups have voiced concerns that the Bill gives potentially expansive roles to the Ministers of Justice and Finance, threatening to politicize the process.

[1](#)2. All sides agree that a new Constitution is essential to preventing future conflicts like that which engulfed Kenya in the wake of the December 2007 elections. However, the road to a new constitution threatens to create friction within the Grand Coalition government; there is no consensus on the two main contentious issues. The selection of members of the Committee of Experts will certainly be key in resolving the constitutional impasse, but ultimately adoption of a new constitution will demand leadership by key political actors.
End Summary.

From Bomas through Kilifi
to a New Constitution

[1](#)3. The Ministry of Justice on June 20 submitted the Constitution of Kenya Review Bill of 2008 (the Bill) into parliamentary procedure. The Bill outlines the process for writing and adopting a new constitution as agreed at the Kofi

Annan-led mediation talks in February. The Bill accepts the Bomas and Kilifi (aka Wako) draft constitutions as the basis for a new draft constitution. (Note: The Bomas Draft was a product of a inclusive consultative process undertaken in 2003 and 2004 involving Members of Parliament, representatives of local governments, and civil society. It proposed establishing a parliamentary system, with most executive power placed in a Prime Minister, and President reduced to Head of State. It also proposed for a broad decentralization of government powers. Dissatisfied with this outcome, President Kibaki tasked Attorney General Amos Wako to reformulate the draft before it was put to a referendum. The result is the Kilifi Draft (aka Wako Draft), which proposed a Presidency with expanded powers and a highly centralized state. It was the Kilifi draft that was put to a referendum in 2005 - and summarily rejected. The divisions bared by this process gave birth to the two main blocs in Kenyan politics today: the Orange Democratic Movement (ODM) is the result of the "NO" camp in the 2005 referendum, while Party of National Unity (PNU) consists mostly of the "YES" camp. End Note.)

The Constitutional Four-Step

14. The Bill envisions a four-step process to adopting a new constitution. The first step is the formation of a mixed Committee of Experts (the Committee), which will have seven members; three non-Kenyans nominated by the African Union-sponsored Panel of Eminent African Personalities and

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four Kenyans who will be nominated by an ad-hoc Parliamentary Select Commission based on a public application process. All Committee members will be appointed by the President, with the nominations being passed through the Minister of Justice.

The Bill disqualifies members of the Constitution of Kenya Review Commission, which produced the Bomas Draft, from membership on the Committee of Experts. The Committee will isolate contentious issues between the two Bomas and Kilifi drafts, and propose options for resolution of these issues -- most significantly, (1) the issue of Presidential versus Parliamentary system of government; and (2) the degree of decentralization of government powers, taking into account public input, expert opinion, and its own research.. The Bill gives the Committee of Experts 12 months to complete its work.

15. The Committee will incorporate its proposals for resolving contentious issues into a draft constitution that an ad-hoc Parliamentary Select Committee (PSC) will consider.

If the PSC reaches consensus on the contentious issues, the Committee will re-draft a constitution based on the PSC's consensus. The new draft will be debated by the entire Parliament. After parliament debates the draft constitution, a "yes" vote of 65 per cent or more will signify approval of the draft.

16. If approved by the Parliament, the draft will be put to a national referendum, administered by the ECK. The ECK, in consultation with the PSC, will frame the question to be submitted to the voters, which should be framed to require a "yes" or "no" answer. Along with the Constitution of Kenya Review Bill, the government has also submitted a proposed constitutional amendment to regulate the referendum. The amendment defines three requirements for ratification of a new constitution: 1) at least 50 per cent voter turnout; 2) at least 65 per cent of valid votes are "yes" votes; and 3) at least 65 per cent of all districts report at least 25 % "yes" votes. The Bill provides for election petitions to be filed contesting the validity of the result of the referendum. If the draft is ratified at the referendum and after all election petitions are exhausted, the President must promulgate and publish the text in Official Gazette within 14 days. Fourteen days after publication, the new

Constitution enters into force.

¶7. At the Kofi Annan-led mediation, the parties agreed to complete a new constitution in 12 months. President Kibaki and Prime Minister Odinga continue to tell interlocutors (as recently as July 3 meetings with CODEL Price, septel), that the new constitution will be passed within 12 months. However, this timeline is probably unrealistic and, under the timelines in the Bill, a new Constitution is unlikely to be finalized in less than 18 months. Vice President Kalonzo Musyoka was quoted in local media as stating that 24 months will be necessary to adopt a new constitution.

Political Ramifications
of the Process

¶8. All sides agree that a new Constitution is essential to preventing future conflicts like that which engulfed Kenya in the wake of the December 2007 elections. However, the road to a new constitution threatens to create friction within the Grand Coalition government; there is no consensus on the two main contentious issues. Of the two, common ground is more likely to be found on the structure of government, with a hybrid Presidential - Parliamentary system likely to emerge with the support of key players who harbor presidential ambitions in 2012, including Odinga himself. Although he made the establishment of an Executive Prime Minister a key point in his election campaign, Odinga has his eyes set on being elected President in 2012 and may ease up on the push to remove all the President's executive powers. Odinga's supporters are eager to see him elevated to the presidency, which may give him some flexibility on the issue.

¶9. On the other main issue, the optimal degree of decentralization of government, opinions remain polarized. The ODM has little wiggle room; its campaign platform to

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decentralize government (ref b) was key to Odinga's success in bringing long-neglected regions (such as Rift Valley Province, Coast Province, and North-Eastern Province into the ODM fold. On the other hand, the PNU campaigned on a anti-decentralization platform and has not modified its stance. The selection of members of the Committee of Experts will certainly be key in resolving the constitutional impasse, but ultimately adoption of a new constitution will demand leadership by key political actors.

Civil Society Objections

¶10. Civil society groups worry that the Bill potentially allows the Ministers of Justice and Finance to politicize the process through their ability to oversee the selection of Committee of Expert members and through the power of the purse that is granted to the Minister of Finance. The Supreme Council of Kenyan Muslims, mindful of the Attorney General's (AG) hijacking of the Bomas draft in 2004, has voiced concerns about the AG's power to revise the draft constitution before it is put to a referendum. However, the Bill limits the AG's ability to make alterations without the consent of the PSC. Civil society also objects to the exclusion from the Committee of Kenyans who participated in the Constitution of Kenya Review Commission. Many of Kenya's best constitutional minds participated in this process and will be sidelined if this provision remains in the law. Civil society objections to ECK administering the referendum are likely to be overcome by events -- the reforms to be proposed by the Independent Review Commission in September will likely have been adopted and implemented by the time a new draft constitution is put to a referendum.

COMMENT

¶11. Civil society objections about the roles given to the Ministers of Justice and Finance have some basis. The legislation requires the PSC to identify, in rank order, the top six Kenyan candidates to serve on the Committee of Experts, while the Minister of Justice should deliver the top four to the President for nomination. However, there are worries that the Minister might find a pretext to eliminate a candidate on political grounds. Probably more serious is the discretion given to the Minister of Finance to determine the salaries and budget for the Committee of Experts. Civil society groups fear this could be used to influence the work of the Committee. We will track this process closely and weigh in as needed. End Comment.
RANNEBERGER